No. 83-1284

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

AMERICAN HOSPITAL ASSOCIATION,
Plaintiff-Petitioner,

vs.

MARGARET M. HECKLER, et al.,
Defendants-Respondents,

and

ILLINOIS MIGRANT COUNCIL, et al.,
Intervening Defendants-Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR THE INTERVENING DEFENDANTS-RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the 1979 Hill-Burton regulations are within the Secretary of Health and Human Services' statutory authority to issue regulations, are not arbitrary or capricious, and are otherwise in accordance with law?

2. Whether the court of appeals' decision is in conflict with *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981)?

PARTIES TO THE PROCEEDINGS

Plaintiff, the petitioner here, is the American Hospital Association. Defendants-Respondents and Intervening Defendants-Respondents are identified in the Petition for Certiorari, 5 n.5.

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42 U.S.C. § 291(a) (1976):

Congressional declaration of purpose

The purpose of this subchapter is—

(a) to assist the several States in the carrying out of their programs for the construction and modernization of such public or other nonprofit community hospitals and other medical facilities as may be necessary, in conjunction with existing facilities, to furnish adequate hospital, clinic, or similar services to all their people;

42 U.S.C. § 291c(e) (1976):

General regulations

The Surgeon General, with the approval of the Federal Hospital Council and the Secretary of Health, Education, and Welfare, shall by general regulations prescribe—

(e) that the State plan shall provide for adequate hospitals, and other facilities for which aid under this part is available, for all persons residing in the State, and adequate hospitals (and such other facilities) to furnish needed services for persons unable to pay therefor. Such regulations may also require that before approval of an application for a project is recommended by a State agency to the Surgeon General for approval under this part, assurance shall be received by the State from the applicant that (1) the facility or portion thereof to be constructed or modernized will be made available to all persons residing in the territorial area of the applicant; and (2)

there will be made available in the facility or portion thereof to be constructed or modernized a reasonable volume of services to persons unable to pay therefor, but an exception shall be made if such a requirement is not feasible from a financial viewpoint.

42 U.S.C. § 291e(b)(3) (1976):

Projects for construction or modernization

Approval by Surgeon General; requisites

(b) The Surgeon General shall approve such application if sufficient funds to pay the Federal share of the cost of such project are available from the appropriate allotment to the State, and if the Surgeon General finds . . . (3) that the application is in conformity with the State plan approved under section 291d of this title and contains an assurance that in the operation of the project there will be compliance with the applicable requirements of the regulations prescribed under section 291c(e) of this title, and with State standards for operation and maintenance.

42 U.S.C. § 300s(3) (1976):

General regulations

The Secretary shall by regulation—

(3) prescribe the general manner in which each entity which receives financial assistance under part A or B [of Title XVI] or has received financial assistance under part A or B or subchapter IV [Title VI] of this chapter shall be required to comply with the assurances required to be made at the time such assistance was received and the means by which such entity shall be required to demonstrate compliance with such assurances.

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STATEMENT

The American Hospital Association's ("AHA") statement, and that of the Secretary, adequately review the prior proceedings. Intervening Defendants-Respondents ("Respondents"), however, disagree with AHA's description of the "assurances" assisted hospitals were required to give, and gave, in return for Hill-Burton hospital construction grants. *See* Petition for Certiorari ("Pet.") at 3. We discuss these assurances at 4, 10, 11, *infra*.

ARGUMENT

I. INTRODUCTION.

Sup. Ct. R. 17.1 limits the cases in which certiorari will be granted to those in which there are "special and important reasons therefor." AHA presents no such reasons here. It can point to no conflict among the courts of appeals. The only two courts of appeals to have considered the validity of the 1979 Hill-Burton regulations have unanimously upheld them. *See Wyoming Hospital Association v. Harris*, No. 81-2469 (10th Cir. Feb. 6, 1984).[1] Nor can it urge any of the other reasons identified in subparts (a) or (b) of the Rule.

Rather, AHA attempts to show that the court of appeals' decision presents an important unresolved question of federal law that should be settled by this Court, and that the decision conflicts with a recent decision of this Court. *See* Sup. Ct. R. 17.1(c).[2] AHA strenuously attempts to meet this standard, but without success, since the lan-

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[1] The Secretary has lodged a copy of this opinion with the Clerk of the Court.

[2] AHA also urges, as a reason for granting the petition, that the question of the validity of the 1979 Hill-Burton regulations is "an important matter to hospitals" (Pet. 5-7), principally because hospitals have, allegedly, been "seriously harmed . . ." by the regulations (Pet. 26-29). Measured by the Rule 17 standards, however, this reason is insufficient to secure this Court's plenary review; any litigant who has lost in the court below can advance such an argument. *See Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74 (1955); *Magnum Import Co. v. De Spoturno Coty*, 262 U.S. 159, 163 (1923). And AHA, in any case, suggests how weak its claim of injury is when it relies largely on factual matters outside the administrative and court records (Pet. 26-28, App. A nn.d and e). *See Batterton v. Francis*, 432 U.S. 416, 426 n.10 (1977); *Camp v. Pitts*, 411 U.S. 138, 140-142 (1973).

guage of the statute, its legislative history, and the prior decisions of this Court, all support the court of appeals' decision. Further review is unwarranted.

II. THE QUESTION OF WHETHER THE COURT OF APPEALS PROPERLY UPHELD THE 1979 HILL-BURTON REGULATIONS IS NOT WORTHY OF REVIEW BY THIS COURT.

In affirming the district court's decision upholding the statutory validity of the Hill-Burton regulations, the court of appeals applied well-established principles governing review of agency rule-making under the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.* (1982). *Schweiker v. Gray Panthers*, 453 U.S. 34, 44 (1981); *Batterton v. Francis*, 432 U.S. 416, 426 (1977); *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 359 (1973); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415-416 (1971); *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 381 (1969). These principles require that the regulations be upheld so long as they are within the scope of the Secretary's authority, are not arbitrary or capricious, and are otherwise in accordance with law. *Id.* The principles further require the judiciary to accord substantial deference to an agency's interpretations of its own authority. *Id.* (Pet. App. 8b-9b.)

AHA neither questions these principles, nor suggests they should be reexamined. In fact, it virtually ignores them. It is thus reduced to quarrelling with the court of appeals' application of these principles to this case. Even if petitioner could show the court misapplied these principles, it would not thereby establish a federal question worthy of plenary review under Sup. Ct. R. 17.1(c). *See Ross v. Moffitt*, 417 U.S. 600, 616-617 (1974). In any event, petitioner shows no error by the court of appeals.

A. Petitioner concedes, as it must, that "providing improved access to health care services for the indigent" was one purpose of the Hill-Burton Act (Pet. 9); (Pet. App. 10b-12b). But petitioner argues that the language of the Hill-Burton statute does not support the challenged regulations (Pet. 8-10). This contention is predicated, in part, on AHA's own conclusory assertions as to what the statute "clearly requires" and what it "clearly . . . does not mandate" (*Id.* at 8). AHA also urges that the "very brief and general language of the [uncompensated service and community service] assurances," 42 U.S.C. §§ 291c(e)(1), (2) (1976), cannot support the regulatory scheme the Secretary has established (Pet. 8, 10). The contention appears to be that if a federal agency promulgates detailed regulations governing a program it administers, the regulations must track a federal statute of comparable detail. (*Id.*).

But generality in statutory schemes is commonplace. *See Schweiker v. Gray Panthers*, 453 U.S. at 43; *American Trucking Assos. v. A.T. & S.F.R. Co.*, 387 U.S. 397, 409-410 (1967). AHA's argument simply ignores the principles governing an agency's scope of authority when promulgating rules that have legislative effect. *Schweiker v. Gray Panthers, supra*, at 44. AHA further ignores the Secretary's broad authority here, under 42 U.S.C. § 291c(e), to issue regulations to implement Congress' legislative purpose. And AHA, while acknowledging that assisted hospitals gave the two assurances relating to uncompensated service and community service (Pet. 7), ignores a third required statutory assurance that all applicants for Hill-Burton assistance gave: to comply with ". . . regulations prescribed under section 291c(e) of this title, . . ." 42

U.S.C. § 291e(b)(3) (1976).[3] Section 291c(e) authorizes the issuance of regulations implementing the uncompensated care and community service assurances. Accordingly, Title VI of the Public Health Service Act, 42 U.S.C. § 291 *et seq.* (1976), expressly authorizes the Secretary to issue the regulations AHA challenges, and obligates assisted hospitals to comply with them. This puts the statutory authorization for the 1979 Hill-Burton regulations comfortably within the limits that this Court consistently has approved. *See Gray Panthers*, 453 U.S. at 43-44; *Batterton*, 432 U.S. at 416, 425, 428, 431; *American Trucking Assos.*, 387 U.S. at 408-411, 416.

B. Petitioner also seeks support for its understanding of the statutory purpose in the legislative history, but this effort has no more merit than its reliance on the "brief and general language" of the assurances. It cites to the remarks of Senator Hill (Pet. 9), to support its claims as to the "overwhelming and controlling purpose" of Title VI. Senator Hill, however, in the same passage from which petitioner selectively quotes, fairly reflected Congress' intent when he urged hospital "construction so that all people of the State may have adequate health and hospital service." *Hearings on S. 191 Before the Senate Comm. on Education and Labor*, 79th Cong., 1st Sess. 8-9 (1945) (hereinafter cited as *1945 Hearings*).

Moreover, the court of appeals cited the colloquy among Senators Ellender, Pepper, and Taft, and Dr. Frederick Mott, together with other legislative history and the

[3] AHA argues that 42 U.S.C. § 291e(b)(3) does not apply to individual hospitals (Pet. 25-26). The statute refutes this contention. 42 U.S.C. § 291e(b)(3) expressly conditions approval of applications on their containing an assurance that in the operation of the project there will be compliance with the applicable requirements of regulations prescribed under 42 U.S.C. § 291c(e). (*See* Pet. App. 5c.)

statute itself, as the bases for its own conclusion that "provision of medical services for the indigent was a major concern among supporters of the bill" (Pet. App. 11b). Petitioner agrees with this conclusion (Pet. 9). Contrary to petitioner's assertion, however, the court of appeals did not read this colloquy as establishing that in Title VI Congress "intended to authorize ever-increasing quotas of uncompensated care from assisted hospitals, regardless of economic consequences" (*Id.* at 9); (Pet. App. 11b-12b). Nor do the challenged regulations anticipate or authorize any such result.

Finally, the quoted colloquy does not show that Congress rejected requiring hospitals to provide a fixed amount of services to the indigent (Pet. 9), in favor of imposing no obligation (*Id.*). Congress defined one purpose of the Act to be construction to furnish "services to all [the] people," 42 U.S.C. § 291(a), and authorized the Surgeon General (and later the Secretary) to issue regulations to achieve this purpose. 42 U.S.C. § 291c(e). Congress discussed service to a "certain number of indigents" as one among several means to assure that service was provided to indigents. *1945 Hearings* at 190-191.

C. By 1974, the Secretary had promulgated detailed regulations to govern assisted facilities in meeting their statutory obligations. 42 C.F.R. § 53.111 (1972); 42 C.F.R. § 53.113 (1974). But Congress found that hospitals had used structural deficiencies in the regulations to avoid fulfilling these obligations. S. Rep. No. 1285, 93rd Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 7842, 7900.[4] To cure this problem and to ensure better

[4] Based on this Senate Report, the court of appeals found that testimony prior to enactment of Title XVI criticized individual facilities. Pet. App. 14b. *See also Hearings on S. 3577 Before the*

(Footnote continued on following page)

enforcement of the Hill-Burton obligations, Congress enacted Title XVI of the Public Health Service Act, as part of the National Health Planning and Resources Development Act of 1974, 42 U.S.C. §§ 300o-300t (1976) ("Title XVI"). Title XVI mandated the regulations challenged here. 42 U.S.C. § 300s(3) (1976).

But while petitioner presses his attack against the 1979 regulations, it concedes the validity of the earlier ones (Pet. 11)—when the two sets are, in important respects, substantially similar.[5] That concession, however, carries with it an acknowledgement that the Secretary had authority under Title VI to issue the pre-1979 regulations, and that such authority was not limited to issuance of

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[4] *continued*
Senate Comm. on Labor and Public Welfare, 93rd Cong., 2d Sess. 148 (hospital's exclusion of persons by refusal to participate in federal and state medical assistance programs or limiting medical assistance recipients' access to certain hospital services; hospital required payment of pre-admission deposits excluding persons without cash on hand or who, while covered by Medicare, could not pay the deductible before admission); 150 (state agency allowed hospitals to credit Medicaid reimbursement toward uncompensated care obligation); 151-152 (in "open door" hospitals, potential recipients of uncompensated care not notified of the availability of such care) (1974). *See also Hearings on the Implementation of the 1970 Amendments to the Hill-Burton Act Before the Senate Comm. on Labor and Public Welfare*, 93rd Cong., 2d Sess. 73, 137-139, 184, 185 (1974).

[5] For example, both the prior and 1979 regulations set forth an annual compliance method for providing uncompensated services at a level not less than 3% of operating costs or 10% of federal assistance. 42 C.F.R. § 53.111(d)(1) (1972); 42 C.F.R. § 124.503(a)(1) (1979). And both regulatory schemes required facilities to make arrangements to participate in Medicare and Medicaid and not to exclude or discriminate against beneficiaries of those programs. 42 C.F.R. § 53.113(d)(2) (1974); 42 C.F.R. § 124.603(c)(1)(ii) (1979); (Pet. App. 13b n.6). Petitioner thus incorrectly states that the 1979 regulations "completely altered" 30 years of administrative interpretation (Pet. 22).

regulations repeating the precise language of 42 U.S.C. §§ 291c(e)(1), (2). If the Secretary had the authority under Title VI to issue the pre-1979 regulations, then she equally had the authority to issue the 1979 regulations under both Title VI and Title XVI (Pet. App. 10b n.4).

D. Bereft of support for its wholesale challenge to the regulations, petitioner is left to attack specific provisions of the regulations as "arbitrary and capricious," 5 U.S.C. § 706, or, in a few instances, as violative of the Hill-Burton statute itself, and thus "contrary to law" within the meaning of 5 U.S.C. § 706(2)(A).

The Secretary's Brief in Opposition answers AHA's principal challenges. We supplement her answer by noting that (1) minimum compliance levels of uncompensated services were part of the Hill-Burton program since 1972, 42 C.F.R. § 53.111(d) (1972); (2) the elimination of the "open door" was amply supported by evidence in the administrative record that the open door option was particularly subject to abuse;[6] (3) the Secretary's refusal to

[6] *See* Memorandum in Support of Federal Defendants' Cross-Motion for Summary Judgment and In Opposition to Plaintiffs' Motion for Summary Judgment, App. II: Dec. 5, 1978 Hearings at 27-32 (Georgia); 36-39 (Indiana); 43-44 (Washington); 77-84 (Rhode Island); Dec. 6, 1978 Hearings at 131 (New Jersey); 133-134 (Indiana); 161-162; 167-168 (Georgia); 186-187 (Texas: three open door hospitals reported providing no uncompensated service); 263-265 (Alabama, Iowa, Kansas, Texas, New York); 297-298 (South Dakota: seven open door hospitals provided no uncompensated service, and another four provided less than $1,500 total). The California Hill-Burton Agency testified about significant difficulties with the open door option. Dec. 6, 1978 Hearings at 82. *See also* Intervening Defendants' Reply Memorandum in Support of Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment, Exh. B and App. I, "Decisions by Secretary of HEW (HHS) on Administrative Complaints Prior to May 18, 1979," Nos. 4, 11, 15, 18, 19, 22, 23, 25, 26. All decisions involved

(Footnote continued on following page)

permit assisted facilities to credit costs above Medicaid and Medicare reimbursement toward the Hill-Burton uncompensated care obligation is consistent with the separate and distinct statutory purposes of the respective programs; *Catholic Medical Center v. New Hampshire-Vermont Hospitalization Service, Inc.*, 707 F.2d 7, 11 (1st Cir. 1983); *St. Mary of Nazareth Hospital Center v. Department of Health and Human Services*, 698 F.2d 1337, 1343 (7th Cir.), *cert. denied*, ____ U.S. ____, 104 S. Ct. 107 (1983) (Pet. App. 19b); (4) the administrative record included substantial evidence that the exclusionary admissions practices prohibited by 42 C.F.R. §124.603(d) (1979) prevented otherwise eligible persons from receiving care at Hill-Burton assisted facilities (Pet. App. 22b n.13); (5) the court in *Wyoming Hospital Ass'n v. Harris*, No. 81-2469, slip op. at 10 (10th Cir. Feb. 6, 1984), explicitly rejected petitioner's argument (Pet. 18) that the prohibition against exclusionary admissions policies in 42 C.F.R. § 124.603(d) violates 42 U.S.C. § 291m (1976); *see also Euresti v. Stenner*, 458 F.2d 1115, 1119 n.5 (10th Cir. 1972); and (6) the 1979 regulations apply prospectively only. *See* 42 C.F.R. § 124.503(a)(1)(ii) (1979); 44 Fed. Reg. 29372-29373 (1979).

III. THE COURT OF APPEALS' DECISION IS NOT IN CONFLICT WITH THE DECISION IN *PENNHURST v. HALDERMAN*, 451 U.S. 1 (1981).

The court of appeals rejected petitioner's challenge to the 1979 regulations based on contract and due process

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[6] *continued*
multiple findings of serious and pervasive problems with the open door option, e.g., wrongful denials of uncompensated care. These documents are lodged with the Clerk of Court, United States District Court, Northern District of Illinois, who currently retains the record in this case. *See also* 43 Fed. Reg. 49957 (1978); 44 Fed. Reg. 29385-29386 (1979).

clause arguments (Pet. App. 23b-26b).[7] AHA raises the challenge anew here, framed as an argument that the court of appeals' decision is inconsistent with *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981) (Pet. 22), and that the 1979 regulations are invalid under *Pennhurst*. (*Id.*) This argument has no merit.

The principal question in *Pennhurst* was whether Congress intended in 42 U.S.C. § 6010 (1976 and Supp. V), to create enforceable rights and obligations. 451 U.S. at 15. This Court concluded that it did not. *Id.* at 11. Petitioner here, in contrast, explicitly concedes that "In return for construction funds, hospitals agreed to several conditions, including the two assurances at issue here" (Pet. 7). *Pennhurst* thus has little, if any, relevance, because the question asked here is wholly different (Pet. App. 25b), and the entire statutory scheme is distinct.

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[7] The court of appeals cited *F.H.A. v. The Darlington*, 358 U.S. 84 (1958); *Thorpe v. Housing Authority of Durham*, 393 U.S. 268 (1969); and *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), to counter the contention that the Hill-Burton regulations constituted an unconstitutional impairment of assisted hospitals' contractual rights (Pet. App. 24b-26b). Petitioner seeks to buttress its reliance on *Pennhurst* by attempting to distinguish each of these cases (Pet. 23-26). None of petitioner's points are persuasive. Petitioner concedes these cases have some application here (Pet. 23), and does not challenge their principles. In any case, the argument the court of appeals felt obliged to answer was one it had previously and properly rejected on the ground that assisted hospitals' obligations could not be wholly understood by traditional contract analysis, because the Hill-Burton program was a "grant-in-aid program, . . . an exercise by the federal government of its authority under the spending power to bring about certain public policy goals" (Pet. App. 23b). Petitioner never successfully rebuts the conclusion that the Hill-Burton program is a grant-in-aid program, and it cannot do so. *See* 40 U.S.C. app. § 214(c) (1976) (defining programs authorized by, *inter alia*, Titles VI and XVI of the Act as "Federal grant-in-aid programs").

Moreover, the court of appeals assumed *arguendo* that the *Pennhurst* principles did apply to the Hill-Burton program (Pet. App. 24b-26b), and concluded the regulations were consistent with those principles. The court concluded that the agreements that assisted facilities entered into consisted not only of their completed Hill-Burton forms, but also the statutory obligations to provide uncompensated care and community services, 42 U.S.C. §§ 291c(e)(1), (2), and to operate their projects in compliance with the Secretary's regulations, 42 U.S.C. § 291e(b)(3) (Pet. App. 25b-26b).

These conditions were clearly stated from the inception of the program. "In return" (Pet. 7), for the federal financial assistance, assisted hospitals agreed to a substantial amount of federal regulation. Thus, assisted hospitals entered into the Hill-Burton program knowing that the regulatory authority of the federal government would be exercised to define their responsibilities under concededly binding statutory conditions—the uncompensated care and community service assurances. Having bound themselves to follow the implementing regulations the federal government would issue, *Wyoming Hospital Ass'n v. Harris*, No. 81-2469, slip op. at 11; (Pet. App. 5c-6c), the hospitals cannot now argue, by reference to *Pennhurst* or any other decision of this Court, that they should have to follow only those regulations they might specifically have anticipated, or that are so modest that they find it convenient to follow them. *See Fleming v. Rhodes*, 331 U.S. 100, 107 (1947) (immunity from future federal regulation not gained through pre-existing contracts); *Veix v. Sixth Ward Building and Loan Association*, 310 U.S. 32, 38 (1940) (entry into regulated enterprise is subject to further legislation on same topic) (*see also* Pet. App. 7c-9c).

CONCLUSION

The Petition for Certiorari should be denied.

Respectfully submitted,

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